

STATE OF TENNESSEE

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Opinion No. 04-041

Prohibiting Yard Signs in Subdivision

QUESTION

Does it violate state or federal law for a private residential subdivision to prohibit a resident of that subdivision from placing a political yard sign in the resident's own yard?

OPINION

Such a restriction does not violate any state statute. The prohibition would be subject to analysis under the First Amendment to the United States Constitution only if it constitutes state action. Under the reasoning of the United States Supreme Court in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001), in order for state action to be present, there must be such a close nexus between the state and the prohibition and other activities of the organization imposing it that the organization's behavior may be fairly treated as that of the state itself. This determination would require an analysis of all the facts and circumstances, including the organization imposing the prohibition and its relationship to state or local government.

If the prohibition is state action, whether it violates the First Amendment rights of property owners depends on its terms. If the prohibition applies only to political yard signs, but not other types of yard signs, it is probably unconstitutional as a content-based restriction. Even if a restriction is content-neutral, it must be narrowly tailored to serve a significant governmental interest, and it must leave open ample alternative channels of communication.

ANALYSIS

This opinion addresses whether a private residential subdivision may prohibit a resident of that subdivision from displaying a political yard sign in the resident's own yard. The question does not specify what type of organization has imposed the prohibition. We assume the term "private residential subdivision" refers to a privately organized homeowners' or developers' association. Further, a definitive answer to this question would depend on the terms of the prohibition as well as other facts and circumstances.

No state statute appears to prohibit a private organization from imposing this type of restriction. The Horizontal Property Act, Tenn. Code Ann. §§ 66-27-101, *et seq.*, authorizes a

developer or owner to establish a “horizontal property regime,” including administration bylaws, in an apartment or condominium. This statutory scheme, however, does not prevent the developer or owner from imposing a restriction on yard signs. Similarly, state statutes governing time-share and vacation club facilities require management arrangements, but do not prohibit restrictions on yard signs. Tenn. Code Ann. §§ 66-32-101, *et seq.*

The question then becomes whether the prohibition violates any provision of the Tennessee or United States Constitution. The First Amendment to the Federal Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” This right of free speech is protected from state infringement through application of the Due Process Clause of the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). In addition, Article I, Section 19 of the Tennessee Constitution provides that “every citizen may freely speak, write, and print on any subject . . .” But the Due Process Clause applies only to state action, not to private action. State action may be found if there is such a close nexus between the state and the challenged action that seemingly private behavior may be fairly treated as that of the state itself. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001). In that case, the United States Supreme Court found that action of the Tennessee Secondary School Athletic Association, which was “nominally” privately organized, was state action subject to compliance with the Due Process Clause of the Fourteenth Amendment. The Court concluded that “[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.” 531 U.S. at 298. The Court emphasized that identifying state action requires the consideration of all the facts and circumstances regarding the relationship between apparently private activity and state government.

Whether a prohibition in a private residential subdivision must comply with First Amendment standards depends, therefore, on the organization that imposed the prohibition and whether its activities are state action. Under the test set forth in *Brentwood Academy*, in order to be state action, there must be such a close nexus between the state and the prohibition and other activities of the organization imposing it that the organization’s behavior may be fairly treated as that of the state itself. We have found no binding authority in this jurisdiction regarding whether the activities of a homeowners’ or developers’ association are state action subject to compliance with constitutional standards. Courts in other jurisdictions have come to different conclusions. In 1989, the United States District Court for the Middle District of Florida found that a condominium regulation barring display of the American flag constituted state action because of the threat that the regulation would be judicially enforced. *Gerber v. Longboat Harbour North Condominium, Inc.*, 724 F.Supp. 884 (M.D.Fla. 1989), *vacated in part*, 757 F.Supp. 1339 (M.D. Fla. 1991). But the United States District Court for the Northern District of Illinois rejected this reasoning several years later. *Goldberg v. 400 East Ohio Condominium Association*, 12 F.Supp.2d 820 (N.D.Ill. 1998). The Court found that “there is no state action inherent in the possible future state court enforcement of a private property agreement.” *Id.* at 823. Further, the United States Court of Appeals for the Eleventh Circuit found that a property owners’ association’s deed restriction prohibiting all yard

signs without the association's prior approval did not constitute state action. *Loren v. Sasser*, 309 F.3d 1296 (11th Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S.Ct. 2219, 155 L.Ed.2d 106 (2003). The Court relied on the reasoning in *Brentwood* and rejected the plaintiff's argument that the threat of judicial enforcement of the deed restriction constitutes state action. *See also Westphal v. Lake Lotawana Association, Inc.*, 95 S.W.3d 144 (W.D. Mo. 2003) (failure to plead facts showing that lake association's action was state action supporting the plaintiff's civil rights claim).

If the prohibition is state action, whether it violates the First Amendment rights of property owners depends on its terms. If the prohibition applies only to political yard signs, but not other types of yard signs, it is presumptively unconstitutional and subject to strict scrutiny. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). Under a strict scrutiny analysis, a regulation must be narrowly tailored to further a compelling governmental interest. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989). We have found no case holding that a restriction on political yard signs, but not other types of yard signs, would survive strict scrutiny.

Even if a restriction is content-neutral, it must be narrowly tailored to serve a significant governmental interest, and it must leave open ample alternative channels of communication. The United States Supreme Court has stated that the right to post residential yard signs is subject to broad protection under the First Amendment. *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). In that case, the Court overturned a city ordinance banning all residential signs except those falling within several exemptions. The Court found that the ordinance could not be justified as a "time, place or manner restriction," because it foreclosed a form of communication for which there was no adequate substitute. *See also Cleveland Board of Realtors v. City of Euclid*, 88 F.3d 382 (6th Cir. 1996), *rehearing and suggestion for rehearing en banc denied* (1996). In that case, the United States Court of Appeals for the Sixth Circuit found unconstitutional an ordinance regulating the size, number, and placement of signs in residential neighborhoods. Even though the ordinance was content-neutral, the Court found that it was not narrowly tailored to serve the city's significant interest in aesthetics and burdened substantially more speech than necessary to further the government's legitimate interests.

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